PD-0790-17

IN THE COURT OF CRIMINAL APPEALS

KEITHRICK THOMAS
Appellant

vs.

THE STATE OF TEXAS
Appellee

ON DISCRETIONARY REVIEW FROM
THE FOURTEENTH COURT OF APPEALS - HOUSTON
No. 14-16-00230-CR

and on

APPEAL FROM
THE 230th DISTRICT COURT -OF HARRIS COUNTY, TEXAS
Cause No. 1454620

APPELLANT'S BRIEF ON THE MERITS

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ORAL ARGUMENT REQUESTED

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STATEMENT OF THE CASE

On January 15, 2015, Appellant Keithrick Thomas was arrested and charged with the offense of Possession of a Controlled Substance. (CR6)[1]. Appellant Thomas filed a Motion to Suppress on November 23, 2015. (CR34). On February 23, 2016, a hearing was held and the trial court denied the Motion to Suppress. (CR38). After the Motion to Suppress was denied, Keithrick Thomas entered a plea of Guilty and was sentenced to two (2) years in the Texas Department of Criminal Justice. (CR58). On March 14, 2016, Appellant Thomas timely filed notice of appeal. (CR62). On October 27, 2016, the 14th Court Appeals set the appellate case for submission on December 7, 2016. The case was submitted on December 7, 2016. The 14th Court of Appeals - Houston Division rendered its opinion and judgment in Keithrick Thomas, Appellant vs. The State of Texas, Appellee, No. 14-16-00230-CR, on June 8, 2017 and affirmed Appellant Thomas' conviction. On September 6, 2017, Appellant Thomas filed his Petition for Discretionary Review. On November 22, 2017, Appellant Thomas' Petition for Discretionary Review was granted and oral argument was granted.

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[1] "CR" refers to Clerk's Record and the number refers to the page number.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is requested, because this case involves an important question about warrantless searches and seizures and Appellant Thomas believes oral argument would assist this Court in its decision. This Honorable Court has granted oral argument.

ISSUE PRESENTED

ISSUE ONE: Has a Fourth Amendment violation occurred, where a police officer approaches a vehicle passenger, after the passenger has exited the vehicle, and conducts a warrantless search of the passenger's pockets, in the driveway of the passenger's house? [RR, 10-11][2]

[2] 'RR' refers to the single volume reporter's record, with page number(s) following.

STATEMENT OF THE FACTS

On January 15, 2015, Officer Rohan Walker was sitting in an unmarked vehicle, assigned to targeting dope houses. (RR,12).[3] Officer Walker's assignment was to watch a house, see who came up and then call a marked unit "and get the PC to stop the vehicle and then go from there." (RR, 13). Officer Walker was watching 4306 Trafalgar. (RR, 13). Officer Walker was assigned to watch the Trafalgar residence, because officers had recovered narcotics from that house in the past. (RR, 13). Officer Walker did not remember when arrests were made from the 4306 Trafalgar residence in the past. (RR, 17).

The facts are in dispute as to when Appellant Thomas arrived at and left the Trafalgar residence on January 15, 2015. According to Appellant Thomas, Appellant Thomas was at the Trafalgar residence from approximately 9:00 AM until between 3:00 PM and 4:00 PM on January 15, 2015. Appellant Thomas was at the residence all day playing video games, watching movies and drinking beer with his friends. Appellant Thomas called a friend's father, John Bradshaw to come and pick Appellant Thomas up. (RR, 73).

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[3] "RR" refers to Reporter's Record and the number refers to the page number.

Three (3) other witnesses verified Appellant Thomas' account. Appellant Thomas' girlfriend, Erica Fisher, indicated that Erica Fisher brought Appellant Thomas to the store for a case of beer and dropped Appellant Thomas off at the Trafalgar residence around 9:00 AM. (RR, 56). Clifton Johnson, Appellant Thomas' friend testified that Appellant Thomas arrived at Mr. Johnson's residence on Trafalgar, between 8:30am and 9:00am on January 15, 2015. (RR, 58). Mr. Johnson stated that Mr. Johnson and Appellant Thomas watched music videos, played Play Station 4 and drank beer all day. (RR, 58-59). Mr. Johnson stated that Appellant Thomas left the residence between 3:30PM and 4:00PM to make a beer run and get food, but never returned. (RR, 59, 60). Charlie Johnson, Sr., the owner of the Trafalgar residence, testified that it is not uncommon for Appellant Thomas to spend an entire day at his residence with his son and that Appellant Thomas spent the entire day at his residence on January 15, 2015. (RR, 65, 67).

According to Officer Walker, from a block away, Officer Walker observed a vehicle pull up to the Trafalgar residence. Appellant Thomas exited the vehicle, walked into the garage of the Trafalgar residence, walked back out after a short time, got back into the vehicle and left the residence. (RR, 14). The record is silent as to what time it was when Officer Walker

observed Appellant Thomas exiting the vehicle and entering the residence. The record does not speak to what time officers began conducting surveillance of the residence on January 15, 2015 or whether Officer Walker had seen Appellant Thomas at any point during the day, prior to the observations Officer Walker testified to.

The undisputed facts are that Officer Walker did not witness Appellant Thomas commit a crime on January 15, 2015. (RR, 18). Officer Walker had never seen Appellant Thomas before in Officer Walker's life. (RR, 19). Officer Walker had no information that Appellant Thomas was known to sell drugs. (RR, 20). Officer Walker did not stop or detain Appellant Thomas when Officer Walker saw Appellant Thomas coming out of the Trafalgar residence, because Officer Walker did not have probable cause. (RR, 21).

Officer Elizabeth Gemmill was a part of the southwest divisional tactical unit on January 15, 2015. (RR, 23). Officer Gemmill had made arrests from the Trafalgar residence approximately one (1) year prior to January 15, 2015, but never arrested Appellant Thomas. (RR, 32, 33). Officer Gemmill had no information that Appellant Thomas was ever involved in any drug transactions at the Trafalgar residence. (RR, 33).

Officer Gemmill and other members of the southwest track unit were

watching the house at 4306 Trafalgar on January 15, 2015. (RR, 24). During the course of the operation, Officer Gemmill was alerted to Appellant Thomas. (RR, 24). Officers Gonzales and Walker, who were in plain clothes and parked in an unmarked vehicle conducting surveillance on the Trafalgar residence, advised Officer Gemmill that Appellant Thomas was a passenger in a vehicle. Officers Gonzales and Walker advised Officer Gemmill that Appellant Thomas exited the vehicle, went inside the garage, came out a short time later, got back into the vehicle and left the location. (RR, 25). A thumb drive with Appellant's driving route was transported to this Honorable Court. (CR73).

Officer Gemmill's task was to find probable cause to pull the vehicle Appellant Thomas was traveling in over. (RR, 35). Officer Gemmill witnessed the driver of the vehicle, who was not Appellant Thomas, commit a traffic violation, failing to signal when making a right turn. (RR, 36). Officer Gemmill did not observe Appellant Thomas commit any traffic violation. (RR, 36).

By the time Officer Gemmill caught up with the vehicle Appellant Thomas was a passenger in, Appellant Thomas had exited the vehicle and was walking up the driveway. (RR, 37). Officer Gemmill does not remember whether the police vehicle's sirens were on, but 'believes' the

lights initiated the traffic stop. (RR, 39). When Officer Gemmill ordered Appellant Thomas to stop, Appellant Thomas was already walking up Appellant Thomas' driveway. (RR, 39). When Officer Gemmill ordered Appellant Thomas to stop, Appellant Thomas complied with Officer Gemmill's orders and stopped. (RR, 40).

Officer Gemmill asked Appellant Thomas to stop, because Officer Gemmill wanted to detain Appellant Thomas as a result of the traffic stop. (RR, 41). Officer Gemmill indicated that when Officer Gemmill asked Appellant Thomas to stop, Officer Gemmill observed Appellant Thomas go for his midsection. (RR, 41). When Officer Gemmill asked Appellant Thomas to stop, Appellant Thomas did not continue to make the 'furtive' movement and stopped the motion, before Officer Gemmill approached Appellant Thomas. (RR, 51). Appellant Thomas did not try to flee. (RR, 52). Officer Gemmill further presented to the court that Officer Gemmill handcuffed Appellant Thomas for officer safety, despite the fact Appellant Thomas had complied with all Officer Gemmill's orders. (RR, 41, 51). At the time Officer Gemmill handcuffed Appellant Thomas, Appellant Thomas had not committed any crimes. (RR, 43). Officer Gemmill admitted that there were no facts which would have lead Officer Gemmill to believe that there was probable cause to believe Appellant Thomas had committed any

crime at the point Officer Gemmill handcuffed Appellant Thomas. (RR, 44). Officer Gemmill frisked Appellant Thomas, after Officer Gemmill handcuffed Appellant Thomas. (RR, 41). Officer Gemmill did not find any weapons on Appellant Thomas. (RR, 42).

Officer Gemmill testified Officer Gemmill saw the top of a pill bottle in Appellant's pocket. (RR, 42). After seeing the top of the pill bottle, Officer Gemmill believed Officer Gemmill had the right to search Appellant Thomas' person. (RR, 44). Upon searching Appellant Thomas more intrusively, Officer Gemmill discovered two (2) more pill bottles. (RR, 44). Officer Gemmill never conducted a pat down for safety, after Officer Gemmill discovered the narcotics on Appellant Thomas. (RR, 18).

SUMMARY OF THE ARGUMENT

The Court of Appeals issued a decision in Appellant Thomas' case that conflicts with opinions of The Court of Criminal Appeals. The decision makes proper protocol related to warrantless search and seizure exceptions unclear to the bench, the bar and law enforcement. The lower court's decision in this case allows law enforcement to enter an individual's private property, without a warrant, and conduct a search and seizure.

ARGUMENT

I. Fourth Amendment protections extend to investigative detentions.

Half a century ago Terry v. Ohio, 392 U.S. 1 (1968) grandfathered the notion that the protection of The Fourth Amendment of the United States Constitution extends to "stop and frisks". The distinctions of classical "stop-and-frisk" theory thus serve to divert attention from the central inquiry under the Fourth Amendment -- the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security. "Search" and "seizure" are not talismans. We therefore reject the notions that the Fourth Amendment does not come into play at all as a limitation upon police conduct if the officers stop short of something called a "technical arrest" or a "full-blown search." Terry v. Ohio, 392 U.S. 1, 19 (1968).

The scheme of the Fourth Amendment becomes meaningful only when it is assured that, at some point, the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances. Terry v. Ohio, 392 U.S. 1, 21 (1968) citing Katz v. United States, 389 U.S. 347, 354-357 (1967); Berger v. New York, 388 U.S. 41, 54-60 (1967); Johnson v. United States, 333 U.S. 10, 13-15 (1948); Wong Sun v. United States, 371 U.S. 471, 479-480 (1963). See also Aguilar v. Texas, 378 U.S. 108, 110-115 (1964). And, in

making that assessment, it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search "warrant a man of reasonable caution in the belief" that the action taken was appropriate? Terry at 22 citing Beck v. Ohio, 379 U.S. 89, 96-97 (1964). Ker v. California, 374 U.S. 23, 34-37 (1963); Wong Sun v. United States, 371 U.S. 471, 479-484 (1963); Rios v. United States, 364 U.S. 253, 261-262 (1960); Henry v. United States , 361 U.S. 98, 100-102 (1959); Draper v. United States, 358 U.S. 307, 312-314 (1959); Brinegar v. United States, 338 U.S. 160, 175-178 (1949); Johnson v. United States, 333 U.S. 10, 15-17 (1948); United States v. Di Re, 332 U.S. 581, 593-595 (1948); Husty v. United States, 282 U.S. 694, 700-701 (1931); Dumbra v. United States, 268 U.S. 435, 441 (1925); Carroll v. United States, 267 U.S. 132, 159-162 (1925); Stacey v. Emery, 97 U.S. 642,645 (1878). Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction. See, e.g., Beck v. Ohio, supra; Rios v. United States, 364 U.S. 253 (1960); Henry v. United States, 361 U.S. 98 (1959). And simple "good faith on the part of the arresting officer is not enough." . . . If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people

would be "secure in their persons, houses, papers, and effects," only in the discretion of the police. Beck v. Ohio, supra, at 97.

In the instant case, the lower Court concluded that Officer Gemmill did not illegally seize the second pill bottle, containing cocaine, from Appellant Thomas' pocket, because Officer Gemmill had probable cause to arrest Appellant Thomas after seizing the first pill bottle. Such a finding is clearly erroneous. Two (2) officers testified at the motion to suppress hearing - Officer Walker and Officer Gemmill. Neither officer could or did say that there was probable cause to search or arrest Appellant Thomas, prior to Officer Gemmill discovering the pill bottles in Appellant Thomas' pockets. Officer Walker, who was in an unmarked unit, testified, "We called a marked unit to get the PC and stop the vehicle." [RR, 15] However, Officer Gemmill, who was in the marked unit, testified, " I was not told to find probable cause. I found probable cause whenever I was told the vehicle was leaving the known narcotics location, yes." [RR, 34]. Appellant Thomas was not the driver of the vehicle and did not commit a traffic violation. Officer Gemmill admitted that there were no facts that would lead Officer Gemmill to believe that there was probable cause to believe Appellant Thomas had committed any crime at the point Officer Gemmill handcuffed Appellant Thomas. (RR, 44).

Neither Officer Walker nor Officer Gemmill provided the court with specific articulable facts that would warrant the intrusion on Appellant Thomas. All the officers had was a hunch that Appellant Thomas was up to something. Appellant Thomas had done nothing out of the ordinary. There was nothing to suggest Appellant Thomas was connected with any unusual activity. The officers did not observe anything at 4306 Trafalgar on January 15, 2015 that would indicate any criminal activity was afoot.

Officer Walker did not witness Appellant Thomas commit a crime on January 15, 2015. (RR, 18). Officer Walker had never seen Appellant Thomas before in Officer Walker's life. (RR, 19). Officer Walker had no information that Appellant Thomas was known to sell drugs. (RR, 20). Officer Walker did not stop or detain Appellant Thomas when Officer Walker saw Appellant Thomas coming out of the Trafalgar residence, because Officer Walker did not have probable cause. (RR, 21).

II. Presence in a high crime area is not sufficient to support an investigative detention.

Presence in a high crime area is not sufficient to support an investigatory detention. See Gamble v. State, 8 S.W.3d 452, 454 (Tex.App.-Houston [1st Dist.] 1999, no pet.). Scott v. State, 549 S.W.2d 170, 172–73 (Tex.Crim.App.1976) also held detention illegal even though it occurred in

a "high crime area"; thefts had been committed in the area; the detainees were driving on a dark, sparsely traveled street at 1:30 a.m.; and materials were observed in the back of their car as it drove past the officers.

This Honorable Court recently decided Marcopoulos v. State, 122017 TXCRIM, PD-0931-16. On September 10, 2014, undercover Houston Police Officer J. Oliver was surveilling Diddy's Sports Bar ("Diddy's"), an establishment in Houston, Texas with a well-documented history of narcotics sales. Officer Oliver saw Marcopoulos enter the bar, leave within three to five minutes, and drive away. As Marcopoulos left, the officer followed him and observed him change lanes without signaling. Hoping to maintain his undercover status, Officer Oliver radioed for a uniformed officer to perform a traffic stop. Id.

Officer T. Villa received this request and, upon stopping his marked police car behind Marcopoulos, noticed him make "furtive gestures" around the center console of his vehicle. Officer Oliver, driving next to Marcopoulos in an unmarked car, also observed these gestures. Officer Villa then activated his emergency lights, stopped Marcopoulos, and immediately arrested him. Villa searched Marcopoulos's vehicle and found two "baggies" of cocaine: one inside the center console and another between the center console and the passenger seat. Villa subsequently searched Marcopoulos's

personal effects and found a third "baggie" of cocaine in his wallet. Id.

The Marcopoulos opinion cited to Sibron v. New York, 392 U.S. 40 (1968). In Sibron a police officer surveilled the defendant for eight hours, observing conversations between him and several other people-all of whom the officer knew to be narcotics addicts. Id. at 45. The officer did not overhear the contents of these conversations; observe any transactions; or see, smell, or otherwise detect the presence of drugs. Id. The uniformed officer eventually approached Sibron, said, "You know what I'm after, " and reached into Sibron's pocket, confiscating several envelopes of heroin. Id.

The court ruled the search unreasonable because, *inter alia*, Sibron's observed behavior did not give rise to probable cause to conduct an arrest for a drug offense. See id. at 62-63. The court emphasized that, although Sibron had affiliated with known addicts, "[t]he inference that persons who talk to narcotics addicts are engaged in the criminal traffic in narcotics is simply not the sort of reasonable inference required to support an intrusion by the police upon an individual's personal security." Sibron, 392 U.S. at 62. The court opined that probable cause required something more-perhaps knowledge of the contents of Sibron's conversations or the observation of a transaction. Id. When the officer approached Sibron, however, "[n]othing resembling probable cause existed." Id.

This court interpreted Sibron to severely limit the probative value of Marcopoulos's presence at Diddy's. As in Sibron, the officer in Marcopoulos's case was not privy to Marcopoulos's business within the bar. This Court opined that though Officer Oliver knew Diddy's to be a hotbed of narcotics activity, this activity was never even remotely linked to Marcopoulos. Oliver did not witness Marcopoulos initiate a transaction; engage anyone in the pursuit of drugs; or possess any containers, cash, or other paraphernalia which would suggest that he intended to buy or had recently bought contraband. Oliver testified that officers had "seen [Marcopoulos] at the location before…But even assuming Marcopoulos had been seen at Diddy's "multiple times, " this hardly leads to the conclusion that Oliver knew Marcopoulos to be a repeat narcotics customer. Marcopoulos v. State, 122017 TXCRIM, PD-0931-16. This Court held that Marcopoulos's behavior of briefly appearing within the bar, does not "warrant a man of reasonable caution in the belief that an offense has been or is being committed and the behavior observed did not muster the proof necessary to establish probable cause. Id.

III. The driveway of a residence is curtilage and is protected by the Fourth Amendment.

Here, in Appellant Thomas' case, Officer Gemmill gave the following

testimony [RR, 39 and 26 - 27]:

Question: Okay. And so -- because I'm unclear with the way you just answered. Are you certain that your lights were on at the time he got out of the vehicle?

Gemmill: I'm not certain. My focus -- my attention was on Mr. Thomas who was exiting the vehicle and I gave him orders to stop.

Question: Okay. Now, when you gave him -- and pulled up to him and gave him orders to stop, he was already walking, correct, on the driveway?

Gemmill: [H]e has to be, yes, ma'am, for the -- on the stop.

Question: Did you notice anything -- did you notice the defendant doing anything unusual while he -- after he stepped out of the vehicle and was walking up towards the residence?

Gemmill: I remember when he was walking towards the residence, he had a beer can in one of his hands. I approached him and I put the beer can on the ground…

Appellant Thomas gave the following testimony [RR, 78 -82]

Question: Now, eventually Mr. Bradshaw made that right turn.

Thomas: That's correct.

Question: And after he made that right turn, did you notice any light or sirens?

Thomas: No, ma'am.

Question: Did you notice any police cars?

Thomas: No police.

Question: Now, eventually you pulled up in front of your home, correct?

Thomas: That's correct.

Question: And at any time did you notice -- before you got out of the vehicle, did you notice any police cars?

Thomas: No, ma'am.

Question: Were there any sirens that you heard?

Thomas: Absolutely not.

Question: Were there any lights that you heard [sic]?

Thomas: No, ma'am.

Question: So, when you got out of your vehicle, can you, for the Court, tell us what you did?

Thomas: Once I exited the back passenger right side of the vehicle, I proceeded to walk up my driveway and throw away the empty carton. As I pulled the last beer out of the case, I threw away the beer case and opened my last beer before I went inside.

Question: Could you point to -- on the screen -- where you were standing at the time that you saw the police car stop in front of your home?

Thomas: I actually was in front of the truck throwing something away. And then I proceeded to walk right in front of the truck and opened my beer about right here. And that's when I was getting ready to walk towards my door. There's a little walkway right there. And that's about the place where they, you know, jumped out and told me whatever they said. I'm not sure.

In making its findings in the instant case, the trial court gave the following narrative: "This is where one of the controvers[ies] actually comes in or, I guess, the main one is whether the officer saw the defendant get out of the vehicle even though they had turned the lights on and/or whether or not the defendant was already out of the vehicle when they first saw -- or when he first [saw] the officer. I can see where both points of view could be perceived from each person, being the officer from the officer's point of view and the defendant's point of view at the time." [RR, 110].

Curtilage comes to us by way of Middle English and traces its roots to the Old French *courtillage,* roughly meaning court or little yard. In modern times it has come to mean those portions of a homeowner's property so closely associated with the home as to be considered part of it. The walkway leading from the street to the house is probably part of the curtilage, and the stairs from the walkway to the porch almost certainly are, as is the porch where grandma sits and rocks most afternoons and watches strangers pass by. The attached garage on the side of the house is part of the curtilage, and so is the detached shed where dad keeps his shop equipment and mom her gardening tools-so long as it's not too far from the house itself. The front lawn is part of the curtilage, and the driveway and the backyard-if it's not too big, and is properly separated from the open fields

beyond the house. United States v. Pineda-Moreno, 617 F.3d 1120 (9th Cir. 2010).

Curtilage ... warrants the Fourth Amendment protections that attach to the home. At common law, *the curtilage is the area to which extends the intimate activity associated with the " sanctity of a man's home and the privacies of life," and therefore has been considered part of home itself for Fourth Amendment purposes.* Pineda-Moreno, at 1121-1122 quoting Oliver v. United States, 466 U.S. 170 (1984). Thus, courts have extended Fourth Amendment protection to the curtilage. 466 U.S. 170, 180, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984) (quoting Boyd v. United States, 116 U.S. 616, 630, 6 S.Ct. 524, 29 L.Ed. 746 (1886)) (emphasis added). Three years later, the Court reiterated the same view in United States v. Dunn, 480 U.S. 294, 300, 107 S.Ct. 1134, 94 L.Ed.2d 326 (1987): [In Oliver] we recognized that the Fourth Amendment protects the curtilage of a house and that the extent of the curtilage is determined by factors that bear upon whether *an individual reasonably may expect that the area in question should be treated as the home itself.* (Emphasis added). *See also* Dow Chemical Co. v. United States, 476 U.S. 227, 231, 106 S.Ct. 1819, 90 L.Ed.2d 226 (1986) (citing Oliver, 466 U.S. at 170, 104 S.Ct. 1735). There's no disputing that the Court considers the curtilage to stand on the same footing as the home itself for

purposes of the Fourth Amendment. Pineda-Moreno, at 1121-1122.

There are many parts of a person's property that are accessible to strangers for limited purposes: the mailman is entitled to open the gate and deposit mail in the front door slot; the gas man may come into the yard, go into the basement or look under the house to read the meter; the gardener goes all over the property, climbs trees, opens sheds, turns on the sprinkler and taps into the electrical outlets; the pool man, the cable guy, the telephone repair man, the garbage collector, the newspaper delivery boy (we should be so lucky) come onto the property to deliver their wares, perform maintenance or make repairs. This doesn't mean that we invite neighbors to use the pool, strangers to camp out on the lawn or police to snoop in the garage. Pineda-Moreno, at 1123 citing United States v. Hedrick, 922 F.2d 396, 400, 402 (7th Cir.1991).

To resolve curtilage questions, four relevant factors are considered: " the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by." United States v. Burston, 806 F.3d 1123 (8th Cir. 2015) citing United States v. Boyster, 436 F.3d 986, 991 (8th Cir. 2006) (quoting United States v. Dunn, 480 U.S. 294, 301, 107

S.Ct. 1134, 94 L.Ed.2d 326 (1987)).

In United States v. Burston, 806 F.3d 1123 (8th Cir. 2015), Officer Fear was informed that there was potential drug use in an apartment in northeast Cedar Rapids. Burston was one of the residents in that apartment. Acting on this information, Officer Fear visited the eight-unit apartment building with his drug-sniffing dog, Marco. Once there, Officer Fear released Marco off-leash to sniff the air alongside the front exterior wall of the west side of the apartment building. There are four exterior apartment doors located on the building's west side, including apartment 4 where Burston resided. His unit had a private entrance and window. A walkway led to his door from a sidewalk, but the walkway did not go directly to (or by) his window. Rather, Burston's window was approximately six feet from the walkway. A bush covered part of his window, and there was a space between the bush and the walkway, which was occupied by his cooking grill. Marco alerted to the presence of drugs six to ten inches from the window of Burston's apartment. More specifically, Marco sat down next to the private window of Burston's apartment, past the bush that partially covered the window. Officer Fear remained six feet from the apartment. Burston, 806 F.3d at 1125.

The area where Marco sniffed was not in an enclosed area. Nor was

the public physically prevented from entering or looking at that area other than by the physical obstruction of the bush. Both parties presented photos into evidence showing a cooking grill between Burston's door and the space where Marco alerted to the presence of drugs. The photos also show the bush in front of Burston's window. Like Burston's apartment, the other apartments had their own door, exterior window, and grassy areas in front. Burston, 806 F.3d at 1125.

The same day Marco alerted outside Burston's window, Officer Fear submitted an application for a search warrant based on Marco's alert and Burston's criminal record. A state magistrate judge issued a search warrant. Six days later, Officers Fear and O'Brien, along with other officers, executed a search of Burston's apartment. The officers found four rifles, ammunition, and marijuana residue. Burston was arrested. Burston, 806 F.3d at 1125.

The 8th Circuit Court of Appeals held that United States v. Dunn, 480 U.S. 294 (1987) supported a finding of curtilage in Burston's case. Burston, 806 F.3d at 1127. First, the area sniffed was in close proximity to Burston's apartment--six to ten inches. That area is " immediately surrounding" his residence. The first Dunn factor " strongly support[s] a finding that the lawn in front of the apartment window is curtilage." Second, the record contains photographic evidence that Burston made personal use

of the area by setting up a cooking grill between the door and his window. Third, there was a bush planted in the area in front of the window, which partially covered the window. One function of the bush was likely to prevent close inspection of Burston's window by passersby. Consideration of the first, third, and fourth Dunn factors outweighs the one Dunn factor that arguably militates against finding the area to be part of the home's curtilage, i.e., the area was not surrounded by an enclosure. The bush, one could argue, served as a barrier to the area sniffed. Hence, we hold the area sniffed constituted the curtilage of Burston's apartment. Burston, 806 F.3d at 1127. The 8th Circuit also relied on the principles of Florida v. Jardines, 133 S.Ct. 1409 (2013) to support it's holding. Burston, 806 F.3d at 1126-1127.

In State v. Rendon, 477 S.W. 3d 805 (2015), which also relied on Florida v. Jardines, 133 S.Ct. 1409 (2013), this Court was asked to decide whether it constitutes a search within the meaning of the Fourth Amendment for law-enforcement officers to bring a trained drug-detection dog directly up to the front door of an apartment-home for the purpose of conducting a canine-narcotics sniff. This Court held that it does. Consistent with the reasoning of the Supreme Court's opinion in Florida v. Jardines, 133 S.Ct. 1409 (2013), this Court concluded that the officers' use of a dog sniff at the

front door of the apartment-home of Michael Eric Rendon, appellee, resulted in a physical intrusion into the curtilage that exceeded the scope of any express or implied license, thereby constituting a warrantless search in violation of the Fourth Amendment.

The Fourth Amendment provides in relevant part that " [t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. CONST. amend. IV. The Court of Criminal Appeals referenced Jardines and noted the Supreme Court explained that the text of the Fourth Amendment establishes a simple baseline." Jardines, 133 S.Ct. at 1414. Namely, the Supreme Court indicated that, when " 'the Government obtains information by physically intruding' on persons, houses, papers, or effects, 'a search within the original meaning of the Fourth Amendment' has 'undoubtedly occurred.'" Jardines (quoting United States v. Jones, 565 U.S. 400, 132 S.Ct. 945, 950 - 951, n. 3 (2012)). In particular, with respect to the special constitutional protections that attach to the home, the Supreme Court observed that, when it comes to the Fourth Amendment, the home is first among equals. At the Amendment's " very core" stands " the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." This right would be of little practical value if the State's agents could stand in a home's porch

front door of the apartment-home of Michael Eric Rendon, appellee, resulted in a physical intrusion into the curtilage that exceeded the scope of any express or implied license, thereby constituting a warrantless search in violation of the Fourth Amendment.

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or side garden and trawl for evidence with impunity; the right to retreat would be significantly diminished if the police could enter a man's property to observe his repose from just outside the front window. Id. (quoting Silverman v. United States, 365 U.S. 505, 511 (1961)).

IV. Furtive gestures, without a reasonably articulable suspicion of criminal activity, do not give rise to probable cause.

In United States v. Lowe, 791 F.3d 424 (3rd Cir. 2015), Philadelphia police officers McGinnis and Campbell received a radio call reporting " flash information of a black male wearing a gray hoodie with a gun in his waistband talking to a female that was at . . . 914 North Markoe Street outside." United States v. Lowe, Crim. No. 11-111, 2014 WL 99452, at *1 (E.D. Pa. Jan. 8, 2014). The tip was anonymous. The 900 block of North Markoe Street is located in " a violent, high crime area known for drug crimes." Id. Approximately 90 minutes before receiving the radio call, Officers Campbell and McGinnis had received a call regarding an alleged gun shot at the 900 block of 49th Street, which is " around the corner" from 914 North Markoe Street. Id. The officers testified that they knew that a shot had been fired at a house, but that no one had been shot and no suspect had been apprehended. 914 North Markoe Street was the home address of Tamika Witherspoon, who is Lowe's close friend.

Officers McGinnis and Campbell were near 914 North Markoe Street when they received the radio call, and they immediately drove to the address. They arrived within two minutes of receiving the call. The officers initially turned their police sirens and lights on, but they turned them off when they were about a block and a half away from the address. The officers parked their police car roughly 50 to 60 feet away from the house. Within seconds, two additional police cars pulled in behind their car. Officer Pezzeca was in one of the additional police cars. Officers McGinnis and Campbell, followed shortly thereafter by Officer Pezzeca and another officer, got out of their cars and quickly moved towards Lowe. As the officers approached the house, they saw Lowe speaking with Witherspoon in front of 914 North Markoe Street. Lowe was wearing a gray hoodie; his hands were in the hoodie pockets and were not visible to the officers. However, the officers did not see a gun or anything indicating that Lowe had a gun, nor did they see or hear any argument or disturbance when they pulled up to the residence. Id.

The District Court recounted the " varying versions" provided by the officers of what happened next. Id. at 2. Officer McGinnis testified that, as he and Officer Campbell approached Lowe, he asked Lowe to remove his hands from his pockets " five to ten times," and Lowe instead " froze" and

looked both ways over his shoulders. Id. According to Officer McGinnis, only after he gave five to ten commands and drew his gun did Lowe take his hands out of his pockets and start to move towards the wall, at which point the officers pushed Lowe against the wall. In contrast, Officer Campbell testified that Lowe did put up his hands in response to the command to stop and do so, and he testified that Lowe voluntarily placed his hands on the wall. Officer Pezzeca testified that as Officers Campbell and McGinnis approached Lowe and told him " several" times to put his hands up, Lowe backed away from the officers and kept his hands in his pockets until Officers Campbell and McGinnis grabbed Lowe and placed him against the wall. Id. All of the officers agreed that the frisk took place by the wall and that, following a brief struggle that ensued when Lowe reached for his waistband during the frisk, a firearm was recovered. Id.

The Lowe court opined that the Fourth Amendment prohibits " unreasonable searches and seizures." U.S. Const. amend. IV. Though law enforcement officers ordinarily must obtain a warrant based on probable cause before conducting a seizure, in Terry v. Ohio the Supreme Court articulated an exception that allows law enforcement to conduct a brief investigatory stop in limited circumstances. 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Under Terry and its progeny, " an officer may,

consistent with the Fourth Amendment, conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot." Illinois v. Wardlow, 528 U.S. 119, 123, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000). The reasonable suspicion that justifies the Terry stop of a suspect also justifies a subsequent protective frisk of that suspect, where officers have reason to believe that the suspect may pose a danger to the officers. Terry, 392 U.S. at 30. United States v. Lowe, 791 F.3d 424, 430 (3rd Cir. 2015).

The 3rd Circuit held 1) when a stationary suspect reacts to a show of authority by not fleeing, making no threatening movement or gesture, and remaining stationary, he has submitted under the Fourth Amendment and a seizure has been effectuated (United States v. Lowe, 791 F.3d 424, 434 (3rd Cir. 2015) and 2) that reasonable suspicion is always evaluated as of the moment of seizure, and that facts that develop after that moment cannot be considered. United States v. Lowe, 791 F.3d 424, 436 (3rd Cir. 2015) citing Johnson v. Campbell, 332 F.3d 199, 205 (3d. Cir. 2003) Because the record did not establish that the police had reasonable suspicion to justify stopping Lowe, the evidence recovered as a result of the ensuing search was found to be the " fruit of the poisonous tree" and ordered suppressed. United States v. Brown, 448 F.3d 239, 244 (3d Cir. 2006) (citing Wong Sun v. United States,

371 U.S. 471, 487-88, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963)).

In United States v. Castle, 825 F.3d 625, 636 (D.C. Cir. 2016), the Government argued that four circumstances supported its contention that Officers Olszak and Moseley had the reasonable, articulable suspicion necessary to stop Appellant where: (1) The officers' knowledge that the neighborhood was a high-crime area particularly associated with PCP distribution. (2) The officers' observation, while on patrol in their unmarked Dodge Ram truck, of Appellant walking quickly away from 133 Yuma Street (a building known for PCP distribution) and toward an abandoned house. (3) Appellant's furtive movements in an alley next to the abandoned house. (4) The officers' prior experience with Appellant, which included PCP related arrests.

" Under the Fourth Amendment our society does not allow police officers to 'round up the usual suspects.'" United States v. Castle, 825 F.3d 625, 629 (D.C. Cir. 2016) citing United States v. Laughrin, 438 F.3d 1245, 1247 (10th Cir. 2006). An officer relying on his or her " knowledge of [an individual's] criminal record" is " required to pair" that knowledge with " 'concrete factors' to demonstrate that there [is] a reasonable suspicion of *current* criminal activity." Castle at 629 citing United States v. Foster, 634 F.3d 243, 247 (4th Cir. 2011) (emphasis added) (citation omitted). In other

words, knowledge of an " individual's criminal history" can " corroborate[]," but not substitute for " objective indications of ongoing criminality." Castle at 629, citing United States v. Monteiro, 447 F.3d 39, 47 (1st Cir. 2006). When putative police evasion or an alleged furtive gesture is what provokes police suspicion, our precedent requires that the Government proffer evidence, *apart from that behavior or gesture*, from which an officer could reasonably have inferred that the individual in question was aware of the recognizable police presence and was responding to it. See Brown, 334 F.3d at 1168; Johnson, 212 F.3d at 1316-17.

" [W]henever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person, and the Fourth Amendment requires that the seizure be 'reasonable.'" Brown v. Texas, 443 U.S. 47, 50, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979) (alteration in original) (citations omitted). A seizure occurs " when physical force is used to restrain movement or when a person submits to an officer's 'show of authority.'" Brodie, 742 F.3d at 1061 (quoting California v. Hodari D., 499 U.S. 621, 626, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991)). Castle at 632.

Pursuant to the Fourth Amendment, a police officer who seizes a person on less than probable cause " must be able to point to specific and articulable facts which, taken together with rational inferences from those

facts," Terry, 392 U.S. at 21, support " a reasonable and articulable suspicion that the person seized is engaged in criminal activity," Reid v. Georgia, 448 U.S. 438, 440, 100 S.Ct. 2752, 65 L.Ed.2d 890 (1980) (per curiam) (citing Brown, 443 U.S. at 51). See also Ornelas, 517 U.S. at 696. It is the Government's burden to provide evidence sufficient to support reasonable suspicion justifying any such stop. See Brown, 443 U.S. at 51-52; see also Royer, 460 U.S. at 500. Castle at 634.

The D.C. Circuit Court reversed the denial of the motion to suppress, because the police officers had no reasonable, articulable suspicion justifying their stop of Appellant. United States v. Castle, 825 F.3d 625, 641 (D.C. Cir. 2016) citing United States v. Sprinkle, 106 F.3d 613, 617-19 (4th Circuit 1997) (an individual's presence in a neighborhood known for drug crimes, " huddl[ing]" with another person in a manner suggestive to the officers of a drug sale, and the individual's effort to hide his face and " dr[i]ve away as soon as the officers walked by" did not provide indicia of criminal activity adequate to support reasonable, articulable suspicion even when combined with the officers' knowledge of the individual's prior criminal record for narcotics offenses). Castle at 641.

In Marcopoulos v. State, 122017 TXCRIM, PD-0931-16, previously discussed, this Honorable Court addressed furtive movements, in addition to

presence in a high crime area. We have repeatedly held that furtive gestures alone are not a sufficient basis for probable cause. See, e.g., Smith v. State, 542 S.W.2d 420, 421-22 (Tex. Crim. App. 1976); Beck v. State, 547 S.W.2d 266, 268-69 (Tex. Crim. App. 1976); Wilson v. State, 511 S.W.2d 531, 534-35 (Tex. Crim. App. 1974). While "[f]urtive movements are valid indicia of *mens rea*, " they must be "coupled with reliable information or other suspicious circumstances relating the suspect to the evidence of crime" to constitute probable cause. Smith, 542 S.W.2d at 421-22. Consequently, this Court focused its analysis on whether Marcopoulos's furtive gestures, when considered alongside his brief appearance at a known narcotics establishment, gave rise to probable cause. The holding was that the furtive gestures, coupled with a brief appearance at a known narcotics location did not give rise to probable cause. Marcopoulos v. State, 122017 TXCRIM, PD-0931-16.

We have held that furtive gestures, absent some concrete evidence of drug activity and informed only by an officer's "vague suspicion, " do not give rise to probable cause. Marcopoulos v. State, 122017 TXCRIM, PD-0931-16 citing Brown v. State, 481 S.W.2d 106, 111 (Tex. Crim. App. 1972). The legal significance of furtive gestures, like any other component of probable cause, is fact-dependent. Second, and perhaps more importantly,

furtive gestures must be supported by evidence that directly, not just "vague[ly], " connects the suspect to criminal activity. E.g., Brown, 481 S.W.2d at 111; see also Wiede v. State, 214 S.W.3d 17 at 27 (Tex. Crim. App. 2007); Parker v. State, 206 S.W.3d 593, 597 (Tex. Crim. App. 2006) (stating that probable cause must "point like a beacon" to a particular person or location); Faulk v. State, 574 S.W.2d 764, 766-67 (Tex. Crim. App. 1979); Turner v. State, 550 S.W.2d 686, 688 (Tex. Crim. App. 1977).

As discussed previously, this Court determined that Marcopoulos's short visit to Diddy's, unsupported by any details concerning the nature of his visit there, did not sufficiently "relat[e]" him to any "evidence of crime." Smith v. State, 542 S.W.2d 420, 421- 422 (Tex. Crim. App. 1976). Furthermore, as in Brown, [where a uniformed police officer in an unmarked car followed a vehicle thought to be occupied by armed-robbery suspects (Brown at 108-109); "observed two men in the back seat turn and look toward him; saw "their shoulders move; concluded that they were concealing firearms in the back seat (Brown at 108); searched the vehicle and discovered marijuana] Marcopoulos did not exhibit furtive gestures in response to police action (e.g., wailing sirens or flashing lights), but rather mere police presence. He was situated in front of a marked police car that had not yet indicated an intention to stop him, and beside an unmarked

police car driven by an undercover officer. Finally, Marcopoulos's movements, unlike those in Wiede v. State, 214 S.W.3d 17 (Tex. Crim. App. 2007) [where a driver was observed reaching over, removing a plastic bag from his pocket, and placing it in the console area. Wiede, 214 S.W.3d at 20-21, 28.] or Turner v. State, 550 S.W.2d 686, 688 (Tex. Crim. App. 1977), [where a driver conspicuously dropped a matchbox to the floor as he exited the vehicle Turner, 550 S.W.2d at 688.], were not connected to a known or suspected instrumentality of crime *e.g.*, a baggie or matchbox. Under these circumstances, Officer Oliver's notions about Marcopoulos, though certainly providing reasonable suspicion justifying a temporary investigative detention, Derichsweiler v. State, 348 S.W.3d 906, 917 (Tex. Crim. App. 2011); Terry v. Ohio, 392 U.S. 1, 21 (1968) did not rise to the level of probable cause justifying a full-blown search. Although Oliver's suspicion was ultimately vindicated, "a search cannot be justified by what it uncovers." Brown, 481 S.W.2d at 112.

Here, in Appellant Thomas' case, when Officer Gemmill ordered Appellant Thomas to stop, Appellant Thomas was already walking up Appellant Thomas' driveway. (RR, 39). Officer Gemmill indicated that when Officer Gemmill asked Appellant Thomas to stop, Officer Gemmill observed Appellant Thomas go for his midsection. (RR, 41). When Officer

Gemmill asked Appellant Thomas to stop, Appellant Thomas did not continue to make the 'furtive' movement and stopped the motion, before Officer Gemmill approached Appellant Thomas. (RR, 51). Appellant Thomas did not try to flee. (RR, 52). Officer Gemmill further presented to the court that Officer Gemmill handcuffed Appellant Thomas for officer safety, despite the fact Appellant Thomas had complied with all Officer Gemmill's orders. (RR, 41, 51). At the time Officer Gemmill handcuffed Appellant Thomas, Appellant Thomas had not committed any crimes. (RR, 43). Officer Gemmill admitted that there were no facts that would lead Officer Gemmill to believe that there was probable cause to believe Appellant Thomas had committed any crime at the point Officer Gemmill handcuffed Appellant Thomas. (RR, 44). Officer Gemmill frisked Appellant Thomas, after Officer Gemmill handcuffed Appellant Thomas. (RR, 41). Officer Gemmill did not find any weapons on Appellant Thomas. (RR, 42).

V. The seizure of an object in plain view is not justified if the incriminating nature of the object is not immediately apparent.

In the present case, the Court of Appeals concluded that Appellant Thomas was not illegally searched, and the first pill bottle containing Xanax was legally seized under the plain view doctrine. The lower court conceded

that it was not immediately apparent that the first pill bottle Officer Gemmill removed from Appellant Thomas' pocket contained Xanax pills that were not prescribed to Appellant Thomas. (See Appendix - Court of Appeals Opinion) Still, the lower court found Officer Gemmill had probable cause to associate the pill bottle with contraband and criminal activity.

The lower court cited to McGaa v. State, No. 04-14-00052-CR, WL 5176652, 2014 *at 1, 3-4 (Tex. App. - San Antonio October 15, 2014, pet. ref'd). McGaa, and the instant case are distinguishable. McGaa was passed out in his vehicle with the motor running and a pill bottle between his legs when the police initially observed McGaa. In contrast, Appellant Thomas was in the driveway of his home, standing upright and alert, and Officer Gemmill discovered the pill bottle on Appellant Thomas' person, in Appellant Thomas' pocket. Further, the officer in McGaa called poison control to identify the pills McGaa possessed. Here, Officer Gemmill operated under pure assumption when determining that the pills Appellant Thomas possessed were Xanax. The lower court also cited to Barron v. State, No. 08-99-00493-CR, 2001 WL 564266, at *4(Tex. App. - El Paso May 25, 2001, no pet.) and Lopez v. State, 223 S.W. 3d 408, 411, 417 (Tex. App. - Amarillo 2006, no pet.) to support its finding that Officer Gemmill legally seized the pill bottle containing Xanax from Appellant Thomas'

pocket. Like, defendant McGaa, defendants Barron and Lopez were physically located in vehicles when pills were seized from those defendants. The officer in Barron retrieved the pill from the console of Barron's car. The officer in Lopez located the pills in a baggie that was protruding from the crease of the vehicle's gas cap. There is no nexus between the facts of Barron and Lopez and Appellant Thomas' case, because Appellant Thomas was in the driveway of his house where Appellant Thomas has the highest expectation of privacy. Further, after observing only the top of a pill bottle protruding from Appellant Thomas' pocket, Officer Gemmill reached into Appellant Thomas' pocket and removed a pill bottle, without it being immediately apparent that the pill bottle was incriminating.

In Arizona v. Hicks, 480 U.S. 321, 107 S.Ct. 1149, 94 L.Ed.2d 347 (1987), The Supreme Court held invalid the seizure of stolen stereo equipment found by police while executing a valid search for other evidence. Although the police were lawfully on the premises, they obtained probable cause to believe that the stereo equipment was contraband only after moving the equipment to permit officers to read its serial numbers. The subsequent seizure of the equipment could not be justified by the plain-view doctrine, the Court explained, because the incriminating character of the stereo equipment was not immediately apparent; rather, probable cause to

believe that the equipment was stolen arose only as a result of a further search-the moving of the equipment-that was not authorized by a search warrant or by any exception to the warrant requirement. United States v. Askew, 529 F.3d 1119, 1132 (D.C. Cir. 2008), 04-3092.

The Askew court referenced Minnesota v. Dickerson, 508 U.S. 366 (1993). In addressing the facts before it, the Dickerson Court described the "dispositive question" as "whether the officer who conducted the search was acting within the lawful bounds marked by Terry at the time he gained probable cause to believe that the lump in respondent's jacket was contraband." Id. at 377, 113 S.Ct. 2130. Answering that question in the negative, the Court concluded that the "officer's continued exploration of respondent's pocket after having concluded that it contained no weapon was unrelated to '[t]he sole justification of the search [under Terry:] ... the protection of the police officer and others nearby.' " Id. at 378, 113 S.Ct. 2130 (quoting Terry, 392 U.S. at 29, 88 S.Ct. 1868) (alterations in original). Thus, the Court found that the manipulation of appellant's pocket "amounted to the sort of evidentiary search that Terry expressly refused to authorize, see [392 U.S.] at 26 [88 S.Ct. 1868], and that we have condemned in" Sibron, 392 U.S. at 65-66, 88 S.Ct. 1889, and Michigan v. Long, 463 U.S. 1032, 1049 n. 14, 103 S.Ct. 3469. Dickerson, 508 U.S. at 378, 113

S.Ct. 2130.

The seizure of an object in plain view is justified if (1) the officer is lawfully where the object can be "plainly viewed, " (2) the "incriminating character" of the object is "immediately apparent, " and (3) the officer has the right to access the object. State v. Betts, 397 S.W.3d 198, 206 (Tex. Crim. App. 2013). State v. Rendon, 477 S.W. 3d 805 (2015) would indicate that, in the instant case, Officer Gemmill was on Appellant Thomas' private property, without a warrant, and not lawfully where the pills could be plainly viewed.

After reviewing the testimony presented at the motion to suppress, the lower court in the case here, Appellant Thomas' case, believed that the incriminating character of the first pill bottle was not immediately apparent, because Officer Gemmill only saw the top of the pill bottle sticking out of Appellant Thomas' pocket. The first two (2) prongs of the plain view exception have not been met, which could, arguably, necessarily negate the third prong - Officer Gemmill had no right to even access Appellant Thomas' property, let alone the pills in Appellant Thomas' pocket.

Officer Gemmill testified Officer Gemmill saw the top of a pill bottle in Appellant's pocket. (RR, 42). After seeing the top of the pill bottle, Officer Gemmill believed Officer Gemmill had the right to search Appellant

Thomas' person. (RR, 44). Upon searching Appellant Thomas more intrusively, Officer Gemmill discovered two (2) more pill bottles. (RR, 44).

The seizure of the pills in Appellant Thomas' pocket was not justified. Officer Gemmill was unlawfully on Appellant Thomas' property. The incriminating character of the pill bottle was not immediately apparent to Officer Gemmill. Officer Gemmill could only see the top of the pill bottle and was not aware, without further intrusion, whether the medication was prescribed to Appellant Thomas or not. Officer Gemmill had no right to pull the bottle out of Appellant Thomas' pocket to check the label, nor did officer Gemmill have a right to start searching for and seizing the other pills Officer Gemmill found on Appellant Thomas.

VI. CONCLUSION

The course of actions of the Houston police Department on January 15, 2015 were not justified at the inception of the course of actions. At Officer Walker's direction, in spite of Officer Walker never knowing anything at all about Appellant Thomas, Officer Gemmill pulled over John Bradshaw, the driver of a vehicle in which Appellant Thomas was a passenger. The driver of the vehicle failed to use his turn signal to indicate a right turn. (RR, 36). The ultimate discovery of the pill bottles in Appellant Thomas' pocket was not at all reasonably related in scope to the

reason officers stopped the driver of the vehicle in the first place.

The most that should have occurred on January 15, 2015 was the driver receiving a traffic violation citation. Officer Walker testified that the driver of the vehicle merely pulled up to the Trafalgar residence, let Appellant Thomas out and did not even enter the residence that Officer Walker indicated was a known drug location. (RR, 14). At Officer Walker's direction however, Officer Gemmill pulled the driver of the vehicle over for an alleged traffic infraction. (RR, 36). The record is silent as to whether the driver actually received a traffic citation, but it is abundantly clear that the resulting detention of Appellant Thomas was not temporary and was overly intrusive. Once the traffic matter was disposed of, the detention should have ended at that point.

Rather, Officer Gemmill used the traffic stop of John Bradshaw as an opportunity to conduct a fishing expedition for the suspected criminal activity of Appellant Thomas, which was wholly unrelated to failing to signal when turning. The facts available to Officer Gemmill at the moment Officer Gemmill detained Appellant Thomas would not reasonably warrant Officer Gemmill's belief that any of the actions Officer Gemmill took following the detention of Appellant Thomas were appropriate.

On mere suspicion, Officer Walker targeted Appellant Thomas and

directed Officer Gemmill to get "PC" to stop him. (RR, 13). The traffic stop of the vehicle in which Appellant Thomas was a passenger, was not, at all, random. From the inception of the detention, Officer Gemmill's sole, deliberate purpose was to search Appellant Thomas and seize any contraband Appellant Thomas may have possessed. Both Officers Walker and Gemmill testified that warrants had been previously executed at the 4306 Trafalgar residence. (RR, 16); (RR, 32). Accordingly, based on training and experience, both officers were fully aware of the warrant requirement. Nonetheless, without a warrant, Officer Gemmill illegally searched Appellant Thomas and discovered the pill bottles, immediately after Officer Gemmill detained Appellant Thomas. There was nothing that occurred between the detention and the search that would justify Officer Gemmill digging in Appellant Thomas' pockets.

Nothing that occurred during the stop justified the extended detention of Appellant Thomas. Officer Gemmill physically intruded into the curtilage that exceeded the scope of any express or implied license and conducted a warrantless search of Appellant Thomas, in violation of the Fourth Amendment. Appellant Thomas had every right to retreat into Appellant Thomas' own home and be free from the unreasonable intrusion of the Houston Police Department. The driveway, especially the portion

closest to the entry of Appellant Thomas' house, is intimately linked to the home itself. No person, including Officer Gemmill, would not recognize this common understanding, based on every day life.

Every action Officer Gemmill took heightened the situation from a 'stop and frisk' incident to detention to a full-blown search and seizure, which, in actuality, elevates the facts of this case from Terry allowances for officer safety to the standard, guaranteed Fourth Amendment protection of a warrant requirement. Without probable cause or reasonable suspicion, Officer Gemmill unlawfully tracked Appellant Thomas to the brink of the door to Appellant Thomas' home. With every illegal action, Officer Gemmill breached a layer of the Fourth Amendment. The lower court clearly erred in making the determination that the incriminating nature of the first pill bottle was not reasonably apparent, but that Officer Gemmill still had probable cause to remove the first bottle and, consequently, the second bottle. The factual determination does not jibe with the legal conclusion.

PRAYER

WHERFORE premises considered, Appellant Thomas prays this Court grant this Petition for Discretionary Review and, after full briefings and oral argument, reverse the decision of The Court of Appeals to effect an

outcome consistent with prior decisions of this Court.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is in accordance with TRAP 34.4 and, in accordance with TRAP 9.4(3), this document contains 9,521 words.

/s/ Nwestbrooks
Nicolette Westbrooks

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing brief was served on all parties via CM/ECF Filing System on January 8, 2018.

/s/ N Westbrooks
Nicolette Westbrooks